Supreme Court, U.S.
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No. 92-1484

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SHOWA DENKO K.K.,
Petitioner,

v.

SYLVIA HILL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment permits the exercise of personal jurisdiction over a foreign defendant manufacturer, where said defendant puts its products into the stream of commerce by creating, employing and controlling a wholly owned subsidiary in the United States for nationwide distribution of the products.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents, Sylvia Hill and Donald Hill, her son and Committee, respectfully request that this Honorable Court deny the petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported at 425 S.E.2d 609 (W. Va., 1992). The opinion of the Circuit Court of Kanawha County, West Virginia is unreported. Both opinions are appended to the petition for writ of certiorari at App. 1a-6a and 19a-32a respectively.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on December 17, 1992. The petition for a writ of certiorari was filed on March 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amnedment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

West Virginia Code Ann. § 31-1-15 provides, in pertinent part:

> The secretary of state is hereby constituted the attorney-in-fact for and on behalf of every corporation created by virtue of the laws of this State and every foreign corporation authorized to conduct affairs or do or transact business herein pursuant to the provisions of this article, with authority to accept service of notice and process on behalf of every such corporation and upon whom service of notice and process may be made in this State for and upon every such corporation. . . .
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> * * * *
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> For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein . . . (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this State notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this State at the time of said injury. . . .

West Virginia Code Ann. § 56-3-33(a) provides, in pertinent part:

> (a) The engaging by a nonresident, or by his duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the secretary of state, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him, in any circuit in this state, . . .:
>
> * * * *
>
> (4) Causing torious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; . . . .

STATEMENT

On August 22, 1990, respondents Sylvia Hill and Donald Hill filed their Complaint in the Circuit Court of Kanawha County. On October 9, 1990, petitioner Showa Denka K.K. (SDK), a Japanese corporation which manufactured the adultered drug at issue in this case, filed a motion to dismiss the claims against it on grounds, *inter alia*, of lack of personal jurisdiction.

On June 18, 1991, following the parties' submission of proposed findings of fact and conclusions of law, the Circuit Court of Kanawha County entered an order in which he adopted SDK's findings and conclusions in their entirety and dismissed SDK from the lawsuit.

On December 19, 1992, following briefing and argument, the Supreme Court of Appeals of West Virginia reversed and remanded the case, concluding, *inter alia*, after an exhaustive review of the facts, that "notions of fair play and substantial justice" require us to exercise

personal jurisdiction over SDK." *Hill by Hill v. Showa Denka, K.K.*, 425 S.E.2d 609, 616 (W. Va., 1992), *citing International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

On or about December 22, 1988, respondent Sylvia Hill was taking the drug L-tryptophan for a sleep disorder, on the advice of her physician. After becoming acutely ill, respondent underwent months of testing and was finally diagnosed in October, 1989 as suffering from eosinophilia-myalgia syndrome, or EMS, a rare and sometimes fatal blood disorder. Respondent is currently in a nursing home and is completely dependent on others. She is unable to walk, sit up on her own or care for herself.

In November, 1989, the Food and Drug Administration issued a recall of products containing L-tryptophan after receiving reports of more than 1,500 EMS cases, including 27 deaths, in which the only common factor among the persons who contracted the disease was their ingestion of medications and products certaining L-tryptophan. Subsequent research led to the nearly unanimous conclusion among medical authorities that EMS was not caused from ingestion of *all* L-tryptophan products, but rather from ingestion of products manufactured by SDK which contained *contamniated* L-tryptophan.

L-tryptophan is an amino acid that occurs naturally in some foods. L-tryptophan supplements are sold both by prescription and over the counter in health food, drug and grocery stores. These products are taken for a variety of health-related problems such as insomnia, appetite control, depression, premenstrual syndrome and stress. Respondent Sylvia Hill's physician had prescribed an L-tryptophan supplement for her as a sleep aid.

Respondent filled her prescription for the L-tryptophan supplement at Rite Aid, which obtains all of its L-tryptophan products in tablet or capsule form from P. Leiner Nutritional Products, Inc. (P. Lanier), an

American processor and nationwide distributor of drug and health food products. In 1988, P. Leiner obtained its supply of raw L-tryptophan in bulk from four suppliers; one of them was Showa Denko America, Inc. (SDA), a wholly owned subsidiary of petitioner Showa Denko K.K. and SDK's sole American distributor for the raw materials it manufactures. In 1989, P. Leiner obtained all of its bulk raw L-tryptophan from SDA.

One hundred percent (100%) of SDA's stock is owned by SDK, and one of SDA's three corporate directors is an employee of SDK. SDA's principal business is the purchase, importation and resale of SDK's products for sale to approximately twenty-three (23) customers in the United States. In 1989, SDA purchased over $10.1 million dollars worth of products from its parent, SDK, for resale in this country.

Additionally, SDA provides liaison and information services for SDK in the United States, including product development, investment opportunities and assistance to SDK visitors. SDK retains so-called "independent" consultants in the United States, and its employees occasionally visit SDA customers, usually accompanied by SDA representatives.

In its discovery responses, SDA admitted that when it learned of the possible link between EMS and L-tryptophan, it immediately notified its parent, SDK; after a brief investigation, SDK *ordered* SDA to "cease immediately any further sales of L-tryptophan." *See Hill by Hill v. Showa Denko, K.K., supra,* 425 S.E.2d at 615:

> The use of the wholly owned subsidiary enabled SDK to run all their United States distribution of L-tryptophan through that company. Further, SDK admitted that once they realized the problem with the L-tryptophan, they ordered SDA to halt distribution. We fail to see how much more control SDK could have over SDA.

It is readily apparent, and the West Virginia Supreme Court of Appeals found, that SDA operates simply as an

agent for petitioner SDK in this country. American processors and distributors placed orders for raw L-tryptophan with SDA, which passed the orders on to SDK; SDK proceeded to fill the orders, shipping the L-tryptophan to SDA for distribution to the buyers. During discovery, SDA admitted that on many occasions it did not even break up the lots of L-tryptophan received from SDK, but simply reshipped them to buyers such as P. Leiner. SDA further admitted that it did not engage in any testing of the shipments; it simply passed the raw, bulk L-tryptophan on to the buyers with the certification of SDK's chemists.

ARGUMENT

In order to satisfy the requirements of constitutional due process, a non-resident corporate defendant must have certain "minimum contacts" with the forum state such that maintenance of a suit does not offend traditional notions of fair play and substantial justice. This is the well-established test first articulated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See also McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

One theory that has been developed in products liability cases, where non-resident manufacturers most frequently find themselves "haled into court," *see International Shoe Co. v. Washington, supra*, is the stream of commerce theory. The theory was perhaps most succinctly stated in *Kickler v. Brookwood Country Club*, 248 F. Supp. 645, 649 (N.D. Ill. 1965):

> [W]hen a manufacturer voluntarily chooses to sell his product in a way in which it will be sold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in any state for the damage the product causes.

Thus, a non-resident manufacturer may be subject to personal jurisdiction in a forum it has not physically entered if it knowingly placed its product into the stream of commerce. The majority of courts in this country have adopted the stream of commerce theory, finding that the "minimum contacts" test of *International Shoe* is satisfied, and that a forum state does not exceed its legitimate powers (legitimate as tested under concepts of due process), where the court asserts personal jurisdiction over a nonresident corporation that delivers its products into the stream of commerce with the expectation that the products will be purchased by consumers in the forum state. *World-Wide Volkswagen Corp., supra; Noel v. S. S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982); *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (9th Cir. 1983); *Tedford v. Grumman American Aviation Corp.*, 448 F. Supp. 144 (N.D. Miss. 1980); *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717 (Minn. 1985); *Morris v. SSE, Inc.*, 343 F.2d 489 (11th Cir. 1988); *Welkerner v. Kirkwood Drug Stores Co.*, 734 S.W.2d 233 (Mo. 1987); *Omstead v. Brader Heaters, Inc.*, 487 P.2d 234 (Wash. 1971); *Hetrick v. American Honda Motor Co.*, 116 (D.C. Neb. 1976); *Look v. Hughes Tool Co.*, 367 F. Supp. 1003 (D.C. N.H. 1973); *Coons v. Honda Motor Co.*, 424 A.2d 446 (N.J. 1980); *Hewitt v. Eichelman's Subaru, Inc.*, 492 A.2d 23 (Pa. 1985); *Irving v. Owen-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir. 1989); *Wessinger v. Vetter Corp.*, 685 F. Supp. 769 (D. Kan. 1987).

Clearly, without the stream of commerce theory, all product liability cases would be doomed to dismissal from forums other than the place of manufacture or initial sale. *Rostad v. On-Deck, Inc., supra.* A manufacturer could evade responsibility for the harm caused by its defective products by requiring injured plaintiffs to split their causes of action and sue in a forum inconvenient for everyone other than the maufacturer.

In an indemnity action in California between Japanese and Taiwanese companies, *Asahi Metal Industry Co. v. Su-*

perior Court, 480 U.S. 102 (1987), this Honorable Court addressed the stream of commerce theory and split on the question of whether placing a product into the stream of commerce, *without more*, was sufficient to allow the forum state to exercise personal jurisdiction over the manufacturer of the product.

A majority of the Justices determined that defendant Asahi had satisfied the minimum contacts test delineated in *International Shoe, supra*, because it had put its goods into a "stream of commerce" that it knew would lead many of them to the forum state. Four members of the Court believed, however, that mere awareness on the manufacturer's part of the product's entry into the stream of commerce was not an act of the manufacturer "purposefully directed toward the forum state" and therefore was insufficient to support the exercise of jurisdiction.

In the opinion, the Justices noted that a manufacturer whose products were sold nationwide received corresponding benefits from the stream of commerce into which its product was placed; it benefited economically from the retail sale of the product, and it benefited indirectly from the forum state's laws regulating and facilitating commercial activity. Thus, the Court concluded, jurisdiction premised on the stream of commerce, even without more, was consistent with due process under *International Shoe*. As Justice Brennan noted in his opinion, the majority of the circuits agree with this view. *Asahi Metal Industry Co. v. Superior Court, supra*, 480 U.S. at 117.

Despite the majority's finding that Asahi's entry of its product into the stream of commerce provided the minimum contacts necessary to sustain California's exercise of personal jurisdiction, the Court looked at the particular facts of *Asahi* and found that the assertion of jurisdiction would violate the *International Shoe* test of reasonableness. In so deciding the Court found that the relevant factors to be considered, *i.e.*, the burden on the defendant, the interests of the forum state, and the plaintiff's interest

in obtaining relief, weighed heavily in Asahi's favor since California had virtually no interest in the maintenance of an indemnity action between Japanese and Taiwanese corporatons, which was all that was left of the lawsuit. The Court further found that the plaintiff's interest was "slight" at best, and probably non-existent, since he had settled out and what remained was an action between two foreign codefendants. Finally, the Court found that "[Asahi] did not *create, control or employ the distribution system* that brought its valves to California," since it sold its valves in Taiwan rather than in the United States. *Asahi, supra,* 480 U.S. at 112 (emphasis supplied).

Under the facts of this case, it is readily apparent that the West Virginia Supreme Court of Appeals did not decide the unresolved question in *Asahi, i.e.,* whether placing a product into the stream of commerce, *without more,* is sufficient to allow the forum state to exercise personal jurisdiction over the manufacturer of the product. Rather, the Supreme Court of Appeals found that respondent Showa Denko K.K. *did* "more" within the meaning of *Asahi.*

> The facts in the case now before us are different from those found in *Asahi.* In *Asahi,* the Japanese valve manufacturer corporation was a separate entity from the Taiwanese company, which purchased the valves and then sold the completed tires in the United States. No evidence was presented which would connect the two foreign corporations. In this case, SDA is a wholly owned subsidiary of SDK, with SDK ordering SDA when to stop selling the defective product. . . .
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> . . . [W]e note that SDK derived substantial revenue from the L-tryptophan purchased and used in West Virginia. Although SDK denied that it solicited business in West Virginia, SDA clearly did. Further, under the analysis set forth in *World-Wide Volkswagon* and affirmed in *Asahi,* we determine that West

> Virginia has a substantial and legitimate interest in exercising personal jurisdiction over SDK, the company that manufactured and sold the contaminated L-tryptophan. Likewise, the burden on the plaintiff would be substantial since SDK, rather than SDA, has the information related to the manufacturing process. SDK's assertions that this need on the part of the plaintiff could be satisfied by open communication between SDA and SDK merely reinforces our conviction that the true authority in this relationship is SDK, *not the shell corporation, SDA*. The burden of SDK submitting to jurisdiction in the United States and West Virginia would be minimal since SDK has already gone through the effort of setting up SDA in the United States. They have obviously found doing business in the United States to be profitable enough to create SDA. We fail to see how defending these suits in the United States would be a greater burden. By contrast, requiring the plaintiff to travel to Japan to litigate this case would create a substantial burden. Consequently, we conclude that "notions of fair play and substantial justice" require us to exercise personal jurisdiction over SDK. *International Shoe,* 326 U.S. at 316, 66 S. Ct. at 158.

Hill by Hill v. Showa Denko K.K., supra, 425 S.E.2d at 614, 616 (emphasis supplied).

On virtually identical facts, in a case involving the same manufacturer (petitioner herein), the Court of Appeals of Georgia reached a similar result in *Showa Denko K.K. v. Pangle,* 202 Ga. App. 245, 414 S.E.2d 658, 661-62 (1991):

> [I]n the case now before us it is not happenstance that the product was ultimately consumed in Georgia. Instead, plaintiff's purchase and use of defendant's product in Georgia was a result of *defendant's deliberate and purposeful nationwide distribution of its product.* [J]ust as other courts have done . . . we choose to apply the stream of commerce analysis set forth by the United States Supreme Court in *World-*

> *Wide Volkswagon* to the facts at hand and find jurisdiction is appropriate in this case because Showa Denko should have reasonably anticipated being haled into court in Georgia.

(Emphasis supplied.) *See also Cunningham v. Suburu of America, Inc.*, 630 F. Supp. 132 (D. Kan. 1986):

> [W]hile Fuji greatly profits from the sale of Suburu Brat vehicles in the United States, it claims that it is immune from all jurisdictional claims against it in the United States. The court views this as a company which seeks to reap all of the benefits without incurring the resultant liabilities and costs. . . . The court finds that Kansas' interest in asserting jurisdiction over Fuji in this action is substantial. Any inconvenience to defendant in defending this lawsuit is clearly outweighed by Kansas' interest in protecting its citizens from injury. *This court finds that it would be fundamentally unfair to allow a foreign manufacturer to insulate itself from the jurisdiction of this court by use of an exclusive distributor.* The court therefore finds that defendant Fuji's motion to dismiss for lack of personal jurisdiction should be denied.

(Emphasis supplied.)

In short, this case, like *Pangle* and *Cunningham*, presents a situation where the petitioner/manufacturer did "more" within the meaning of *Asahi* than merely put its product into the stream of commerce within the country of manufacture. It *created* a wholly owned subsidiary in the United States, SDA (termed a "shell corporation" by the West Virginia Supreme Court of Appeals) to distribute its bulk L-tryptophan on a nationwide basis in this country. It *employed* the distribution system that brought its L-tryptophan products to West Virginia. It ultimately *controlled* the products' distribution, as evidenced by its admitted order to SDA to cease distribution after FDA warnings about the L-tryptophan-EMS link.

Finally, as found by the West Virginia Supreme Court of Appeals after full review of the facts, West Virginia has a substantial and legitimate interest in maintenance of this suit in the forum where the product was distributed and the resident plaintiff was catastrophically injured; the burden on the petitioner in defending in West Virginia is insubstantial, ". . . since SDK has already gone through the effort of setting up SDA in the United States. . .," *Hill by Hill v. Showa Denko K.K., supra,* 425 S.E.2d at 616; and requiring the respondent to litigate this action in Japan would create a substantial burden since petitioner SDK, rather than its "shell corporation" SDA, has the information related to the manufacturing process. *Id.*

The established test of *Asahi* is fully met under the facts of this case, the judgment of the West Virginia Supreme Court of Appeals is fully supported by the law and the evidence, and the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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